REPORT

OF THE CONFERENCE OF

CHIEF JUSTICES

Pasadena, California

August, 1958

AN HISTORIC STATEMENT
ON JUDICIAL SELF-RESTRAINT

THE CONFERENCE OF CHIEF JUSTICES

REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Adopted, August, 1958

Reprinted and distributed as a public service by The Virginia Commission on Constitutional Government, as the first in a series of vital documents on State and Federal relations.

(Fourth Printing)

PREFACE

MANY individuals and organizations have criticized the Supreme Court of the United States since that great tribunal was established 170 years ago. And throughout this period, much has been written of the role of the States in relation to their central government.

But never in the history of American jurisprudence, nor in the long story of State and Federal relationships, has so powerful a criticism of the Court come forth, from such high and respected authority, as the now famed Report of the Conference of Chief Justices.

This report was recommended unanimously by the Conference's Committee on Federal-State Relationships as Affected by Judicial Decisions. On August 23, 1958, at the close of the Conference sessions at Pasadena, Calif., the report was adopted 36-8. Voting against adoption were the Chief Justices, or their representatives, from California, New Jersey, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, and Hawaii. Two States, Nevada and North Dakota, abstained. Three States, Connecticut, Indiana and Arkansas, were not represented at the closing session. All other States voted in favor of the Report.

Whether one agrees or disagrees with the findings and recommendations of this Report, there can be little quarrel that the document has an enduring historic value. As such, it is offered as the first in a series of statements on State and Federal relations to be published and distributed by the Virginia Commission on Constitutional Government, an agency of the Commonwealth of Virginia. Comments and suggestions on further documents in the series are cordially invited.

DAVID J. MAYS, *Chairman.*

RICHMOND, VIRGINIA.
October, 1959.

☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆

REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS

Foreword

YOUR Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized however, that an expert survey of recent Su-

preme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Cramton;
3. "Congress, the States and Commerce" by Professor Allison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and
5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations" by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of

April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report.

Background and Perspective

We think it desirable at the outset of this report to set out some points which may help to put the report in proper perspective, familiar or self-evident as these points may be.

First, though decisions of the Supreme Court of the United

States have a major impact upon federal-state relationships and have had such an impact since the days of Chief Justice Marshall, they are only a part of the whole structure of these relationships. These relations are, of course, founded upon the Constitution of the United States itself. They are materially affected not only by judicial decisions but in very large measure by Acts of Congress adopted under the powers conferred by the Constitution. They are also affected, or may be affected, by the exercise of the treaty power.

Of great practical importance as affecting federal-state relationships are the rulings and actions of federal administrative bodies. These include the independent agency regulatory bodies, such as the Interstate Commerce Commission, the Federal Power Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, the Federal Communications Commission and the National Labor Relations Board. Many important administrative powers are exercised by the several departments of the Executive Branch, notably the Treasury Department and the Department of the Interior. The scope and importance of the administration of the federal tax laws are, of course, familiar to many individuals and businesses because of their direct impact, and require no elaboration.

Second, when we turn to the specific field of the effect of judicial decisions on federal-state relationships we come at once to the question as to where power should lie to give the ultimate interpretation to the Constitution and to the laws made in pursuance thereof under the authority of the United States. By necessity and by almost universal common consent, these ultimate powers are regarded as being vested in the Supreme Court of the United States. Any other allocation of such power would seem to lead to chaos. (See Judge Learned Hand's most interesting Holmes Lectures on "The Bill of Rights" delivered at the Harvard Law School this year and published by the Harvard University Press.)

Third, there is obviously great interaction between federal legislation and administrative action on the one hand, and decisions of the Supreme Court on the other, because of the power of the Court to interpret and apply Acts of Congress and to determine the validity of administrative action and the permissible scope thereof.

Fourth, whether federalism shall continue to exist, and if so in what form, is primarily a political question rather than a judicial question. On the other hand, it can hardly be denied that judicial decisions, specifically decisions of the Supreme Court, can give tremendous impetus to changes in the allocation of powers and responsibilities as between the federal and the state governments. Likewise, it can hardly be seriously disputed that on many occasions the decisions of the Supreme Court have produced exactly that effect.

Fifth, this Conference has no legal powers whatsoever. If any conclusions or recommendations at which we may arrive are to have any effect, this can only be through the power of persuasion.

Sixth, it is a part of our obligation to seek to uphold respect for law. We do not believe that this goes so far as to impose upon us an obligation of silence when we find ourselves unable to agree with pronouncements of the Supreme Court (even though we are bound by them), or when we see trends in decisions of that Court which we think will lead to unfortunate results. We hope that the expression of our views may have some value. They pertain to matters which directly affect the work of our state courts. In this report we urge the desirability of self-restraint on the part of the Supreme Court in the exercise of the vast powers committed to it. We endeavor not to be guilty ourselves of a lack of due restraint in

expressing our concern and, at times, our criticisms in making the comments and observations which follow.

Problems of Federalism

The difference between matters primarily local and matters primarily national was the guiding principle upon which the framers of our national Constitution acted in outlining the division of powers between the national and state governments.

This guiding principle, central to the American federal system, was recognized when the original Constitution was being drawn and was emphasized by de Tocqueville. Under his summary of the federal Constitution he says:

"The first question which awaited the Americans was so to divide the sovereignty that each of the different states which composed the union should continue to govern itself in all that concerned its internal prosperity, while the entire nation, represented by the Union, should continue to form a compact body and to provide for all general exigencies. The problem was a complex and difficult one. It was as impossible to determine beforehand, with any degree of accuracy, the share of authority that each of the two governments was to enjoy as to foresee all the incidents in the life of a nation."

In the period when the Constitution was in the course of adoption the "Federalist" (No. 45) discussed the division of sovereignty between the Union and the States and said: "The powers delegated by the Constitution to the Federal Government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the internal order and prosperity of the State."

Those thoughts expressed in the "Federalist" of course are those of the general period when both the original Constitution and the Tenth Amendment were proposed and adopted. They long antedated the proposal of the Fourteenth Amendment.

The fundamental need for a system of distribution of powers between national and state governments was impressed sharply upon the framers of our Constitution not only because of their knowledge of the governmental systems of ancient Greece and Rome. They also were familiar with the government of England; they were even more aware of the colonial governments in the original states and the governments of those states after the Revolution. Included in government on this side of the Atlantic was the institution known as the New England town meeting, though it was not in use in all of the states. A town meeting could not be extended successfully to any large unit of population, which, for legislative action, must reply upon representative government.

But it is this spirit of self-government, of *local* self-government, which has been a vital force in shaping our democracy from its very inception.

The views expressed by our late brother, Chief Justice Arthur T. Vanderbilt, on the division of powers between the national and state governments—delivered in his addresses at the University of Nebraska and published under the title "The Doctrine of the Separation of Powers and Its Present Day Significance"—are persuasive. He traced the origins of the doctrine of the separation of powers to four sources: Montesquieu and other political philosophers who preceded him; English constitutional experience; American colonial experience; and the common sense and political wisdom of the Founding Fathers. He concluded his comments on the experiences of the American colonists with the British govern-

ment with this sentence: "As colonists they had enough of a completely centralized government with no distribution of powers and they were intent on seeing to it that they should never suffer such grievances from a government of their own construction."

His comments on the separation of powers and the system of checks and balances and on the concern of the Founding Fathers with the proper distribution of governmental power between the nation and the several states indicates that he treated them as parts of the plan for preserving the nation on the one side and individual freedom on the other—in other words, that the traditional tripartite vertical division of powers between the legislative, the executive and the judicial branches of government was not an end in itself, but was a means towards an end; and that the horizontal distribution or allocation of powers between national and state governments was also a means towards the same end and was a part of the separation of powers which was accomplished by the federal Constitution. It is a form of the separation of powers with which Montesquieu was not concerned; but the horizontal division of powers, whether thought of as a form of separation of powers or not, was very much in the minds of the framers of the Constitution.

Two Major Developments in the Federal System

The outstanding development in federal-state relations since the adoption of the national Constitution has been the expansion of the power of the national government and the consequent contraction of the powers of the state governments. To a large extent this is wholly unavoidable and indeed is a necessity, primarily because of improved transportation and communication of all kinds and because of mass production. On the other hand, our Constitution does envision federalism. The very name of our nation indicates that it is to be composed of states. The Supreme Court of a bygone day said in *Texas* v. *White*, 7 Wall. 700, 721 (1868): "The Constitution, in all its provisions, looks to an indestructible Union of indestructible States."

Second only to the increasing dominance of the national government has been the development of the immense power of the Supreme Court in both state and national affairs. It is not merely the final arbiter of the law; it is the maker of policy in many major social and economic fields. It is not subject to the restraints to which a legislative body is subject. There are points at which it is difficult to delineate precisely the line which should circumscribe the judicial function and separate it from that of policy-making. Thus, usually within narrow limits, a court may be called upon in the ordinary course of its duties to make what is actually a policy decision by choosing between two rules, either of which might be deemed applicable to the situation presented in a pending case.

But if and when a court in construing and applying a constitutional provision or a statute becomes a policy maker, it may leave construction behind and exercise functions which are essentially legislative in character, whether they serve in practical effect as a constitutional amendment or as an amendment of a statute. It is here that we feel the greatest concern, and it is here that we think the greatest restraint is called for. There is nothing new in urging judicial self-restraint, though there may be, and we think there is, new need to urge it.

It would be useless to attempt to review all of the decisions of the Supreme Court which have had a profound effect upon the course of our history. It has been said that the Dred Scott decision made the Civil War inevitable. Whether this is really true or not, we need not attempt to determine. Even if it is discounted as a serious overstatement, it remains a dramatic

reminder of the great influence which Supreme Court decisions have had and can have. As to the great effect of decisions of that Court on the economic development of the country, see Mr. Justice Douglas' Address on *Stare Decisis*, 49 Columbia Law Review 735.

Sources of National Power

Most of the powers of the national government were set forth in the original constitution; some have been added since. In the days of Chief Justice Marshall the supremacy clause of the federal Constitution and a broad construction of the powers granted to the national government were fully developed, and as a part of this development the extent of national control over interstate commerce became very firmly established. The trends established in those days have never ceased to operate and in comparatively recent years have operated at times in a startling manner in the extent to which interstate commerce has been held to be involved, as for example in the familiar case involving an elevator operator in a loft building.

From a practical standpoint the increase in federal revenues resulting from the Sixteenth Amendment (the Income Tax Amendment) has been of great importance. National control over state action in many fields has been vastly expanded by the Fourteenth Amendment.

We shall refer to some subjects and types of cases which bear upon federal-state relationships.

The General Welfare Clause

One provision of the federal Constitution which was included in it from the beginning but which, in practical effect, lay dormant for more than a century, is the general welfare clause. In *United States* v. *Butler*, 297 U. S. 1, the original Agricultural Adjustment Act was held invalid. An argument was advanced in that case that the general welfare clause would sustain the imposition of the tax and that money derived from the tax could be expended for any purposes which would promote the general welfare. The Court viewed this argument with favor as a general proposition, but found it not supportable on the facts of that case. However, it was not long before that clause was relied upon and applied. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, and *Helvering* v. *Davis*, 301 U. S. 690. In those cases the Social Security Act was upheld and the general welfare clause was relied upon both to support the tax and to support the expenditures of the money raised by the Social Security taxes.

Grants-in-Aid

Closely related to this subject are the so-called grants-in-aid which go back to the Morrill Act of 1862 and the grants thereunder to the so-called land-grant colleges. The extent of grants-in-aid today is very great, but questions relating to the wisdom as distinguished from the legal basis for such grants seem to lie wholly in the political field and are hardly appropriate for discussion in this report. Perhaps we should also observe that since the decision of *Massachusetts* v. *Mellon*, 262 U. S. 447, there seems to be no effective way in which either a state or an individual can challenge the validity of a federal grant-in-aid.

Doctrine of Pre-emption

Many, if not most, of the problems of federalism today arise either in connection with the commerce clause and the vast extent to which its sweep has been carried by the Supreme Court, or they arise under the Fourteenth Amendment. Historically, cases involving the doctrine of pre-emption pertain mostly to the commerce clause. More recently the doctrine has

been applied in other fields, notably in the case of *Commonwealth of Pennsylvania* v. *Nelson*, in which the Smith Act and other federal statutes dealing with communism and loyalty problems were held to have pre-empted the field and to invalidate or suspend the Pennsylvania anti-subversive statute which sought to impose a penalty for conspiracy to overthrow the government of the United States by force or violence. In that particular case it happens that the decision of the Supreme Court of Pennsylvania was affirmed. That fact, however, emphasizes rather than detracts from the wide sweep now given to the doctrine of pre-emption.

Labor Relations Cases

In connection with commerce clause cases, the doctrine of pre-emption, coupled with only partial express regulation by Congress, has produced a state of considerable confusion in the field of labor relations.

One of the most serious problems in this field was pointed up or created (depending upon how one looks at the matter) by the Supreme Court's decision in *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, which overturned a state statute aimed at preventing strikes and lockouts in public utilities. This decision left the states powerless to protect their own citizens against emergencies created by the suspension of essential services, even though, as the dissent pointed out, such emergencies were "economically and practically confined to a [single] state."

In two cases decided on May 28, 1958, in which the majority opinions were written by Mr. Justice Frankfurter and Mr. Justice Burton, respectively, the right of an employee to sue a union in a state court was upheld. In *International Association of Machinists* v. *Gonzales*, a union member was held entitled to maintain a suit against his union for damages for

wrongful expulsion. In *International Union, United Auto, etc. Workers* v. *Russell*, an employee, who was not a union member, was held entitled to maintain a suit for malicious interference with his employment through picketing during a strike against his employer. Pickets prevented Russell from entering the plant.

Regardless of what may be the ultimate solution of jurisdictional problems in this field, it appears that at the present time there is unfortunately a kind of no-man's land in which serious uncertainty exists. This uncertainty is in part undoubtedly due to the failure of Congress to make its wishes entirely clear. Also, somewhat varying views appear to have been adopted by the Supreme Court from time to time.

In connection with this matter, in the case of *Textile Union* v. *Lincoln Mills*, 353 U. S. 448, the majority opinion contains language which we find somewhat disturbing. That case concerns the interpretation of Section 301 of the Labor Management Relations Act of 1947. Paragraph (a) of that Section provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Paragraph (b) of the same Section provides in substance that a labor organization may sue or be sued as an entity without the procedural difficulties which formerly attended suits by or against unincorporated associations consisting of large numbers of persons. Section 301 (a) was held to be more than jurisdictional and was held to authorize federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and to include within that body of federal law

specific performance of promises to arbitrate grievances under collective bargaining agreements.

What a state court is to do if confronted with a case similar to the *Lincoln Mills* case is by no means clear. It is evident that the substantive law to be applied must be federal law, but the question remains, where is that federal law to be found? It will probably take years for the development or the "fashioning" of the body of federal law which the Supreme Court says the federal courts are authorized to make. Can a state court act at all? If it can act and does act, what remedies should it apply? Should it use those afforded by state law, or is it limited to those which would be available under federal law if the suit were in a federal court? It is perfectly possible that these questions will not have to be answered, since the Supreme Court may adopt the view that the field has been completely pre-empted by the federal law and committed solely to the jurisdiction of the federal courts, so that the state courts can have no part whatsoever in enforcing rights recognized by Section 301 of the Labor Management Relations Act. Such a result does not seem to be required by the language of Section 301 nor yet does the legislative history of that Section appear to warrant such a construction.

Professor Meltzer's monograph has brought out many of the difficulties in this whole field of substantive labor law with regard to the division of power between state and federal governments. As he points out much of this confusion is due to the fact that Congress has not made clear what functions the states may perform and what they may not perform. There are situations in which the particular activity involved is prohibited by federal law, others in which it is protected by federal law, and others in which the federal law is silent. At the present time there seems to be one field in which state action

is clearly permissible. That is where actual violence is involved in a labor dispute.

State Law in Diversity Cases

Not all of the decisions of the Supreme Court in comparatively recent years have limited or tended to limit the power of the states or the effect of state laws. The celebrated case of *Erie R. R.* v. *Tompkins*, 304 U. S. 64, overruled *Swift* v. *Tyson* and established substantive state law, decisional as well as statutory, as controlling in diversity cases in the federal courts. This marked the end of the doctrine of a federal common law in such cases.

In Personam Jurisdiction Over Non-Residents

Also, in cases involving the *in personam* jurisdiction of state courts over non-residents, the Supreme Court has tended to relax rather than tighten restrictions under the due process clause upon state action in this field. *International Shoe Co.* v. *Washington*, 326 U. S. 310, is probably the most significant case in this development. In sustaining the jurisdiction of a Washington court to render a judgment *in personam* against a foreign corporation which carries on some activities within the State of Washington, Chief Justice Stone used the now familiar phrase that there "were sufficient contacts or ties with the State of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there." Formalistic doctrines or dogmas have been replaced by a more flexible and realistic approach, and this trend has been carried forward in subsequent cases leading up to and including *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, until halted by *Hanson* v. *Denckla*, 357 U. S. decided June 23, 1958.

Taxation

In the field of taxation the doctrine of intergovernmental immunity has been seriously curtailed partly by judicial decisions and partly by statute. This has not been entirely a one-way street.

In recent years cases involving state taxation have arisen in many fields. Sometimes they have involved questions of burdens upon interstate commerce or the export-import clause, sometimes of jurisdiction to tax as a matter of due process, and sometimes they have arisen on the fringes of governmental immunity, as where a state has sought to tax a contractor doing business with the national government. There have been some shifts in holdings. On the whole, the Supreme Court seems perhaps to have taken a more liberal view in recent years towards the validity of state taxation than it formerly took.

Other Fourteenth Amendment Cases

In many other fields, however, the Fourteenth Amendment has been invoked to cut down state action. This has been noticeably true in cases involving not only the Fourteenth Amendment but also the First Amendment guarantee of freedom of speech or the Fifth Amendment protection against self-incrimination. State anti-subversive acts have been practically eliminated by *Pennsylvania* v. *Nelson* in which the decision was rested on the ground of pre-emption of the field by the federal statutes.

The Sweezy Case—State Legislative Investigations

One manifestation of this restrictive action under the Fourteenth Amendment is to be found in *Sweezy* v. *New Hampshire*, 354 U. S. 234. In that case, the State of New Hampshire had enacted a subversive activity statute which imposed various disabilities on subversive persons and subversive organizations. In 1953 the legislature adopted a resolution under which it constituted the Attorney General a one-man legislative committee to investigate violations of that Act and to recommend additional legislation. Sweezy, described as a non-Communist Marxist, was summoned to testify at the investigation conducted by the Attorney General, pursuant to this authorization. He testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign, and (2) inquiries concerning a lecture Sweezy had delivered in 1954 to a class at the University of New Hampshire. He was adjudged in contempt by a state court for failure to answer these questions. The Supreme Court reversed the conviction, but there is no majority opinion. The opinion of the Chief Justice, in which he was joined by Justices Black, Douglas and Brennan, started out by reaffirming the position taken in *Watkins* v. *United States*, 354 U. S. 178, that legislative investigations can encroach on First Amendment rights. It then attacked the New Hampshire Subversive Activities Act and stated that the definition of subversive persons and subversive organizations was so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity." Then followed a lengthy discourse on the importance of academic freedom and political expression. This was not, however, the ground upon which these four Justices ultimately relied for their conclusion that the conviction should be reversed. The Chief Justice said in part: "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney Gen-

eral has been given such a sweeping and uncertain mandate that it is his discretion which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it can not be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated."

Four members of the Court, two in a concurring opinion and two in a dissenting opinion, took vigorous issue with the view that the conviction was invalid because of the legislature's failure to provide adequate standards to guide the Attorney General's investigation. Mr. Justice Frankfurter and Mr. Justice Harlan concurred in the reversal of the conviction on the ground that there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state and hence that the liberties of the individual should prevail. Mr. Justice Clark, with whom Mr. Justice Burton joined, arrived at the opposite conclusion and took the view that the state's interest in self-preservation justified the intrusion into Sweezy's personal affairs.

In commenting on this case Professor Cramton says: "The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power."

Public Employment Cases

There are many cases involving public employment and the question of disqualification therefor by reason of Communist party membership or other questions of loyalty. *Slochower* v. *Board of Higher Education*, 350 U. S. 551, is a well known example of cases of this type. Two more recent cases, *Lerner* v. *Casey*, and *Beilan* v. *Board of Public Education*, both in 357 U. S. and decided on June 30, 1958, have upheld disqualifications for employment where such issues were involved, but they did so on the basis of lack of competence or fitness. Lerner was a subway conductor in New York and Beilan was a public school instructor. In each case the decision was by a 5 to 4 majority.

Admission to the Bar

When we come to the recent cases on admission to the bar, we are in a field of unusual sensitivity. We are well aware that any adverse comment which we may make on those decisions lays us open to attack on the grounds that we are complaining of the curtailment of our own powers and that we are merely voicing the equivalent of the ancient protest of the defeated litigant—in this instance the wail of a judge who has been reversed. That is a prospect which we accept in preference to maintaining silence on a matter which we think cannot be ignored without omitting an important element of the subject with which this report is concerned.

Konigsberg v. *State Bar of California*, 353 U. S. 252, seems to us to reach the high water mark so far established by the Supreme Court in overthrowing the action of a state and in denying to a state the power to keep order in its own house.

The majority opinion first hurdled the problem as to whether or not the federal question sought to be raised was properly presented to the state highest court for decision and

was decided by that court. Mr. Justice Frankfurter dissented on the ground that the record left it doubtful whether this jurisdictional requirement for review by the Supreme Court had been met and favored a remand of the case for certification by the state highest court of "whether or not it did in fact pass on a claim properly before it under the Due Process Clause of the Fourteenth Amendment." Mr. Justice Harlan and Mr. Justice Clark shared Mr. Justice Frankfurter's jurisdictional views. They also dissented on the merits in an opinion written by Mr. Justice Harlan, of which more later.

The majority opinion next turned to the merits of Konigsberg's application for admission to the bar. Applicable state statutes required one seeking admission to show that he was a person of good moral character and that he did not advocate the overthrow of the national or state government by force or violence. The Committee of Bar Examiners, after holding several hearings on Konigsberg's application, notified him that his application was denied because he did not show that he met the above qualifications.

The Supreme Court made its own review of the facts.

On the score of good moral character, the majority found that Konigsberg had sufficiently established it, that certain editorials written by him attacking this country's participation in the Korean War, the actions of political leaders, the influence of "big business" on American life, racial discrimination and the Supreme Court's decision in *Dennis* v. *United States*, 341 U. S. 494, would not support any rational inference of bad moral character, and that his refusal to answer questions "almost all" of which were described by the Court as having "concerned his political affiliations, editorials and beliefs" (353 U. S. 269) would not support such an inference either. On the matter of advocating the overthrow of the national or state government by force or violence, the Court held (as it had in

the companion case of *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U. S. 232, decided contemporaneously) that past membership in the Communist party was not enough to show bad moral character. The majority apparently accepted as sufficient Konigsberg's denial of any present advocacy of the overthrow of the government of the United States or of California, which was uncontradicted on the record. He had refused to answer questions relating to his past political affiliations and beliefs, which the Bar Committee might have used to test the truthfulness of his present claims. His refusal to answer was based upon his views as to the effect of the First and Fourteenth Amendments. The Court did not make any ultimate determination of their correctness, but (at 353 U. S. 270) said that "prior decisions by this Court" indicated that his objections to answering the questions (which we shall refer to below) were not frivolous.

The majority asserted that Konigsberg "was not denied admission to the California Bar simply because he refused to answer questions." In a footnote appended to this statement it is said (353 U. S. 259): "Neither the Committee as a whole nor any of its members ever intimated that Konigsberg would be barred just because he refused to answer relevant inquiries or because he was obstructing the Committee. Some members informed him that they did not necessarily accept his position that they were not entitled to inquire into his political associations and opinions and said that his failure to answer would have some bearing on their determination whether he was qualified. But they never suggested that his failure to answer their questions was, by itself, a sufficient independent ground for denial of his application."

Mr. Justice Harlan's dissent took issue with these views—convincingly, we think. He quoted lengthy extracts from the record of Konigsberg's hearings before the subcommittee and

the committee of the State Bar investigating his application. (353 U. S. 284-309.) Konigsberg flatly refused to state whether or not at the time of the hearing he was a member of the Communist Party and refused to answer questions on whether he had ever been a Communist or belonged to various organizations, including the Communist Party. The Bar Committee conceded that he could not be required to answer a question if the answer might tend to incriminate him; but Konigsberg did not stand on the Fifth Amendment and his answer which came nearest to raising that question, as far as we can see, seems to have been based upon a fear of prosecution for perjury for whatever answer he might then give as to membership in the Communist Party. We think, on the basis of the extracts from the record contained in Mr. Justice Harlan's dissenting opinion that the Committee was concerned with its duty under the statute "to certify as to this applicant's good moral character" (p. 295), and that the Committee was concerned with the applicant's "disinclination" to respond to questions proposed by the Committee (p. 301), and that the Committee, in passing on his good moral character, sought to test his veracity (p. 303).

The majority, however, having reached the conclusion above stated, that Konigsberg had not been denied admission to the bar simply because he refused to answer questions, then proceeded to demolish a straw man by saying that there was nothing in the California statutes or decisions, or in the rules of the Bar Committee which had been called to the Court's attention, suggesting that a failure to answer questions "is *ipso facto*, a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." Whether Konigsberg's "overwhelming" showing of his own good character would have been shaken if he had answered the relevant questions which he refused to answer, we cannot say. We have long been under the impression that candor is required of members of the bar and, prior to *Konigsberg* we should not have thought that there was any doubt that a candidate for admission to the bar should answer questions as to matters relating to his fitness for admission, and that his failure or refusal to answer such questions would warrant an inference unfavorable to the applicant or a finding that he had failed to meet the burden of proof of his moral fitness.

Let us repeat that Konigsberg did not invoke protection against self-incrimination. He invoked a privilege which he claimed to exist against answering certain questions. These might have served to test his veracity at the Committee hearings held to determine whether or not he was possessed of the good moral character required for admission to the bar.

The majority opinion seems to ignore the issue of veracity sought to be raised by the questions which Konigsberg refused to answer. It is also somewhat confusing with regard to the burden of proof. At one point (pp. 270-271) it says that the Committee was not warranted in drawing from Konigsberg's refusal to answer questions any inference that he was of bad moral character; at another (p. 273) it says that there was no evidence in the record to justify a finding that he had failed to establish his good moral character.

Also at page 273 of 353 U. S., the majority said: "We recognize the importance of leaving States free to select their own bars, but it is equally important that the State not exercise this power in an arbitrary or discriminatory manner nor in such way as to impinge on the freedom of political expression or association. A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. It is also important to

society and the bar itself that lawyers be unintimidated—free to think, speak and act as members of an Independent Bar." The majority thus makes two stated concessions—each, of course, subject to limitations—one, that it is important to leave the states free to select their own bars and the other, that "a bar composed of lawyers of good character is a worthy objective."

We think that Mr. Justice Harlan's dissent on the merits, in which Mr. Justice Clark joined, shows the fallacies of the majority position. On the facts which we think were demonstrated by the excerpts from the record included in that dissent, it seems to us that the net result of the case is that a state is unable to protect itself against admitting to its bar an applicant who, by his own refusal to answer certain questions as to what the majority regarded as "political" associations and activities, avoids a test of his veracity through cross-examination on a matter which he has the burden of proving in order to establish his right to admission to the bar. The power left to the states to regulate admission to their bars under *Konigsberg* hardly seems adequate to achieve what the majority chose to describe as a "worthy objective"—"a bar composed of lawyers of good character."

We shall close our discussion of *Konigsberg* by quoting two passages from Mr. Justice Harlan's dissent, in which Mr. Justice Clark joined. In one, he states that "this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter." In the other, his concluding comment (p. 312), he says: "[W]hat the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of State concern."

The *Lerner* and *Beilan* cases above referred to seem to indicate some recession from the intimations, though not from the decisions, in the *Konigsberg* and *Slochower* cases. In *Beilan* the school teacher was told that his refusal to answer questions might result in his dismissal, and his refusal to answer questions pertaining to loyalty matters was held relevant to support a finding that he was incompetent. "Incompetent" seems to have been taken in the sense of unfit.

State Administration of Criminal Law

When we turn to the impact of decisions of the Supreme Court upon the state administration of criminal justice, we find that we have entered a very broad field. In many matters, such as the fair drawing of juries, the exclusion of forced confessions as evidence, and the right to counsel at least in all serious cases, we do not believe that there is any real difference in doctrine between the views held by the Supreme Court of the United States and the views held by the highest courts of the several states. There is, however, a rather considerable difference at times as to how these general principles should be applied and as to whether they have been duly regarded or not. In such matters the Supreme Court not only feels free to review the facts, but considers it to be its duty to make an independent review of the facts. It sometimes seems that the rule which governs most appellate courts in the view of findings of fact by trial courts is given lip service, but is actually given the least possible practical effect. Appellate courts generally will give great weight to the findings of fact by trial courts which had the opportunity to see and hear the witnesses, and they are reluctant to disturb such findings. The Supreme Court at times seems to read the records in criminal cases with a somewhat different point of view. Perhaps no

more striking example of this can readily be found than in *Moore* v. *Michigan*, 335 U. S. 155.

In the *Moore* case the defendant had been charged in 1937 with the crime of first degree murder, to which he pleaded guilty. The murder followed a rape and was marked by extreme brutality. The defendant was a Negro youth, 17 years of age at the time of the offense, and is described as being of limited education (only the 7th grade) and as being of rather low mentality. He confessed the crime to law enforcement officers and he expressed a desire to plead guilty and "get it over with." Before such a plea was permitted to be entered he was interviewed by the trial judge in the privacy of the judge's chambers and he again admitted his guilt, said he did not want counsel and expressed the desire to "get it over with," to be sent to whatever institution he was to be confined in, and to be placed under observation. Following this, the plea of guilty was accepted and there was a hearing to determine the punishment which should be imposed. About 12 years later the defendant sought a new trial principally on the ground that he had been unfairly dealt with because he was not represented by counsel. He had expressly disclaimed any desire for counsel at the time of his trial. Pursuant to the law of Michigan, he had a hearing on this application for a new trial. In most respects his testimony was seriously at variance with the testimony of other witnesses. He was corroborated in one matter by a man who had been a deputy sheriff at the time when the prisoner was arrested and was being questioned. The trial court, however, found in substance that the defendant knew what he was doing when he rejected the appointment of counsel and pleaded guilty, that he was then calm and not intimidated, and, after hearing him testify, that he was completely unworthy of belief. It accordingly denied the application for a new trial. This denial was

affirmed by the Supreme Court of Michigan, largely upon the basis of the findings of fact by the trial court. The Supreme Court of the United States reversed. The latter Court felt that counsel might have been of assistance to the prisoner, in view of his youth, lack of education and low mentality, by requiring the state to prove its case against him (saying the evidence was largely circumstantial), by raising a question as to his sanity, and by presenting factors which might have lessened the severity of the penalty imposed. It was the maximum permitted under the Michigan law—solitary confinement for life at hard labor. The case was decided by the Supreme Court of the United States in 1957. The majority opinion does not seem to have given any consideration whatsoever to the difficulties of proof which the state might encounter after the lapse of many years or the risks to society which might result from the release of a prisoner of this type, if the new prosecution should fail. They are, however, pointed out in the dissent.

Another recent case which seems to us surprising, and the full scope of which we cannot foresee, is *Lambert* v. *California*, 355 U. S., decided December 16, 1957. In that case a majority of the Court reversed a conviction under a Los Angeles ordinance which required a person convicted of a felony, or of a crime which would be felony under the law of California, to register upon taking up residence in Los Angeles. Lambert had been convicted of forgery and had served a long term in a California prison for that offense. She was arrested on suspicion of another crime and her failure to register was then discovered and she was prosecuted, convicted and fined. The majority of the Supreme Court found that she had no notice of the ordinance, that it was not likely to be known, that it was a measure merely for the convenience of the police, that the defendant had no opportunity to comply with it after

learning of it and before being prosecuted, that she did not act willfully in failing to register, that she was not "blameworthy" in failing to do so, and that her conviction involved a denial of due process of law.

This decision was reached only after argument and reargument. Mr. Justice Frankfurter wrote a short dissenting opinion in which Mr. Justice Harlan and Mr. Justice Whittaker joined. He referred to the great number of state and federal statutes which imposed criminal penalities for non-feasance and stated that he felt confident that "the present decision will turn out to be an isolated deviation from the strong current of precedents—a derelict on the waters of the law."

We shall not comment in this report upon the broad sweep which the Supreme Court now gives to habeas corpus proceedings. Matters of this sort seem to fall within the scope of the Committee of this Conference on the Habeas Corpus Bill which has been advocated for some years by this Conference for enactment by the Congress of the United States, and has been supported by the Judicial Conference of the United States, the American Bar Association, the Association of Attorneys General and the Department of Justice.

We cannot, however, completely avoid any reference at all to habeas corpus matters because what is probably the most far reaching decision of recent years on state criminal procedure which has been rendered by the Supreme Court is itself very close to a habeas corpus case. That is the case of *Griffin* v. *Illinois*, 351 U. S. 12, which arose under the Illinois Post Conviction Procedure Act. The substance of the holding in that case may perhaps be briefly and accurately stated in this way: If a transcript of the record, or its equivalent, is essential to an effective appeal, and if a state permits an appeal by those able to pay for the cost of the record or its equivalent, then the state must furnish without expense to an indigent defendant either a transcript of the record at his trial, or an equivalent thereof, in order that the indigent defendant may have an equally effective right of appeal. Otherwise, the inference seems clear, the indigent defendant must be released upon habeas corpus or similar proceedings. Probably no one would dispute the proposition that the poor man should not be deprived of the opportunity for a meritorious appeal simply because of his poverty. The practical problems which flow from the decision in *Griffin* v. *Illinois* are, however, almost unlimited and are now only in course of development and possible solution. This was extensively discussed at the 1957 meeting of this Conference of Chief Justices in New York.

We may say at this point that in order to give full effect to the doctrine of *Griffin* v. *Illinois*, we see no basis for distinction between the cost of the record and other expenses to which the defendant will necessarily be put in the prosecution of an appeal. These include filing fees, the cost of printing the brief and of such part of the record as may be necessary, and counsel fees.

The *Griffin* case was very recently given retroactive effect by the Supreme Court in a per curiam opinion in *Eskridge* v. *Washington State Board of Prison Terms and Paroles*, 78 S. Ct. 1061. In that case the defendant, who was convicted in 1935, gave timely notice of an appeal. His application then made for a copy of the transcript of the trial proceedings to be furnished at public expense was denied by the trial judge. A statute provided for so furnishing a transcript if "in his [the trial judge's] opinion justice will thereby be promoted." The trial judge found that justice would not be promoted, in that the defendant had had a fair and impartial trial, and that, in his opinion, no grave or prejudicial errors had occurred in the trial. The defendant then sought a writ of mandate from the

Supreme Court of the state, ordering the trial judge to have the transcript furnished for the prosecution of his appeal. This was denied and his appeal was dismissed. In 1956 he instituted habeas corpus proceedings which, on June 16, 1958, resulted in a reversal of the Washington Court's decision and a remand "for further proceedings not inconsistent with this opinion." It was conceded that the "reporter's transcript" from the trial was still available. In what form it exists does not appear from the Supreme Court's opinion. As in *Griffin*, it was held that an adequate substitute for the transcript might be furnished in lieu of the transcript itself. Justices Harlan and Whittaker dissented briefly on the ground that "on this record the Griffin case decided in 1956 should not be applied to this conviction occurring in 1935." This accords with the view expressed by Mr. Justice Frankfurter in his concurring opinion in *Griffin* that it should not be retroactive. He did not participate in the *Eskridge* case.

Just where *Griffin* v. *Illinois* may lead us is rather hard to say. That it will mean a vast increase in criminal appeals and a huge case load for appellate courts seems almost to go without saying. There are two possible ways in which the meritorious appeals might be taken care of and the non-meritorious appeals eliminated. One would be to apply a screening process to appeals of all kinds, whether taken by the indigent or by persons well able to pay for the cost of appeals. It seems very doubtful that legislatures generally would be willing to curtail the absolute right of appeal in criminal cases which now exists in many jurisdictions. Another possible approach would be to require some showing of merit before permitting an appeal to be taken by an indigent defendant at the expense of the state.

Whether this latter approach which we may call "screening" would be practical or not is, to say the least, very dubi-

ous. First, let us look at a federal statute and Supreme Court decisions thereunder. What is now subsection (a) of Section 1915 of Title 28, U. S. C. A. contains a sentence reading as follows: "An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." This section or a precursor thereof was involved in *Miller* v. *United States*, 317 U. S. 192, *Johnson* v. *United States*, 352 U. S. 565, and *Farley* v. *United States*, 354 U. S. 521, 523. In the *Miller* case the Supreme Court held that the discretion of the trial court in withholding such a certificate was subject to review on appeal, and that in order that such a review might be made by the Court of Appeals it was necessary that it have before it either the transcript of the record or an adequate substitute therefor, which might consist of the trial judge's notes or of an agreed statement as to the points on which review was sought. Similar holdings were made by per curiam opinions in the *Johnson* and *Farley* cases, in each of which the trial court refused to certify that the appeal was taken in good faith. In each case, though perhaps more clearly in *Johnson*, the trial court seems to have felt that the proposed appeal was frivolous, and hence not in good faith.

The *Eskridge* case, above cited, decided on June 16, 1958, rejected the screening process under the state statute there involved, and appears to require, under the Fourteenth Amendment, that a full appeal be allowed—not simply a review of the screening process, as under the federal statute above cited. The effect of the *Eskridge* case thus seems rather clearly to be that unless all appeals, at least in the same types of cases, are subject to screening, none may be.

It would seem that it may be possible to make a valid classification of appeals which shall be subject to screening and of appeals which shall not. Such a classification might be based upon the gravity of the offense or possibly upon the sentence

imposed. In most, if not all, states, such a classification would doubtless require legislative action.

In the *Griffin* case, it will be recalled, the Supreme Court stated that a substitute for an actual transcript of the record would be acceptable if it were sufficient to present the points upon which the defendant based his appeal. The Supreme Court suggested the possible use of bystanders' bills of exceptions.

It seems probable to us that an actual transcript of the record will be required in most cases. For example, in cases where the basis for appeal is the alleged insufficiency of the evidence, it may be very difficult to eliminate from that part of the record which is to be transcribed portions which seem to have no immediate bearing upon this question. A statement of the facts to be agreed upon by trial counsel for both sides may be still more difficult to achieve even with the aid of the trial judge.

The danger of swamping some state appellate courts under the flood of appeals which may be loosed by *Griffin* and *Eskridge* is not a reassuring prospect. How far *Eskridge* may lead and whether it will be extended beyond its facts remain to be seen.

Conclusions

This long review, though far from exhaustive, shows some of the uncertainties as to the distribution of power which are probably inevitable in a federal system of government. It also shows, on the whole, a continuing and, we think, an accelerating trend towards increasing power of the national government and correspondingly contracted power of the state governments. Much of this is doubtless due to the fact that many matters which were once mainly of local concern are now parts of larger matters which are of national concern. Much

of this stems from the doctrine of a strong, central government and of the plenitude of national power within broad limits of what may be "necessary and proper" in the exercise of the granted powers of the national government which was expounded and established by Chief Justice Marshall and his colleagues, though some of the modern extensions may and do seem to us to go to extremes. Much, however, comes from the extent of the control over the action of the states which the Supreme Court exercises under its views of the Fourteenth Amendment.

We believe that strong state and local governments are essential to the effective functioning of the American system of federal government; that they should not be sacrificed needlessly to leveling, and sometimes deadening, uniformity; and that in the interest of active, citizen participation in self-government—the foundation of our democracy—they should be sustained and strengthened.

As long as this country continues to be a developing country and as long as the conditions under which we live continue to change, there will always be problems of the allocation of power depending upon whether certain matters should be regarded as primarily of national concern or as primarily of local concern. These adjustments can hardly be effected without some friction. How much friction will develop depends in part upon the wisdom of those empowered to alter the boundaries and in part upon the speed with which such changes are effected. Of course, the question of speed really involves the exercise of judgment and the use of wisdom, so that the two things are really the same in substance.

We are now concerned specifically with the effect of judicial decisions upon the relations between the federal government and the state governments. Here we think that the overall tendency of decisions of the Supreme Court over the last

25 years or more has been to press the extension of federal power and to press it rapidly. There have been, of course, and still are, very considerable differences within the Court on these matters, and there has been quite recently a growing recognition of the fact that our government is still a federal government and that the historic line which experience seems to justify between matters primarily of national concern and matters primarily of local concern should not be hastily or lightly obliterated. A number of justices have repeatedly demonstrated their awareness of problems of federalism and their recognition that federalism is still a living part of our system of government.

The extent to which the Supreme Court assumes the function of policy-maker is also of concern to us in the conduct of our judicial business. We realize that in the course of American history the Supreme Court has frequently—one might, indeed, say customarily—exercised policy-making powers going far beyond those involved, say, in making a selection between competing rules of law.

We believe that in the fields with which we are concerned, and as to which we feel entitled to speak, the Supreme Court too often has tended to adopt the role of policy-maker without proper judicial restraint. We feel this is particularly the case in both of the great fields we have discussed—namely, the extent and extension of the federal power, and the supervision of state action by the Supreme Court by virtue of the Fourteenth Amendment. In the light of the immense power of the Supreme Court and its practical non-reviewability in most instances no more important obligation rests upon it, in our view, than that of careful moderation in the exercise of its policy-making role.

We are not alone in our view that the Court, in many cases arising under the Fourteenth Amendment, has assumed what

seem to us primarily legislative powers. (See Judge Learned Hand on the Bill of Rights.) We do not believe that either the framers of the original Constitution or the possibly somewhat less gifted draftsmen of the Fourteenth Amendment ever contemplated that the Supreme Court would, or should, have the almost unlimited policy-making powers which it now exercises. It is strange, indeed, to reflect that under a constitution which provides for a system of checks and balances and of distribution of power between national and state governments one branch of one government—the Supreme Court—should attain the immense, and in many respects, dominant, power which it now wields.

We believe that the great principle of distribution of powers among the various branches of government and between levels of government has vitality today and is the crucial base of our democracy. We further believe that in construing and applying the Constitution and laws made in pursuance thereof, this principle of the division of power based upon whether a matter is primarily of national or of local concern should not be lost sight of or ignored, especially in fields which bear upon the meaning of a constitutional or statutory provision, or the validity of state action presented for review. For, with due allowance for the changed conditions under which it may or must operate, the principle is as worthy of our consideration today as it was of the consideration of the great men who met in 1787 to establish our nation as a nation.

It has long been an American boast that we have a government of laws and not of men. We believe that any study of recent decisions of the Supreme Court will raise at least considerable doubt as to the validity of that boast. We find first that in constitutional cases unanimous decisions are comparative rarities and that multiple opinions, concurring or dissenting, are common occurrences. We find next that divisions in

result on a 5 to 4 basis are quite frequent. We find further that on some occasions a majority of the Court cannot be mustered in support of any one opinion and that the result of a given case may come from the divergent views of individual Justices who happen to unite on one outcome or the other of the case before the Court.

We further find that the Court does not accord finality to its own determinations of constitutional questions, or for that matter of others. We concede that a slavish adherence to *stare decisis* could at times have unfortunate consequences; but it seems strange that under a constitutional doctrine which requires all others to recognize the Supreme Court's rulings on constitutional questions as binding adjudications of the meaning and application of the Constitution, the Court itself has so frequently overturned its own decisions thereon, after the lapse of periods varying from one year to seventy-five, or even ninety-five years. (See the tables appended to Mr. Justice Douglas' address on *Stare Decisis*, 49 Columbia Law Review 735, 756-758.) The Constitution expressly sets up its own procedures for amendment, slow or cumbersome though they may be.

These frequent differences and occasional overrulings of prior decisions in constitutional cases cause us grave concern as to whether individual views of the members of the court as from time to time constituted, or of a majority thereof, as to what is wise or desirable do not unconsciously override a more dispassionate consideration of what is or is not constitutionally warranted. We believe that the latter is the correct approach, and we have no doubt that every member of the Supreme Court intends to adhere to that approach, and believes that he does so. It is our earnest hope which we respectfully express, that that great Court exercise to the full its power of judicial self-restraint by adhering firmly to its tremendous, strictly

judicial powers and by eschewing, so far as possible, the exercise of essentially legislative powers when it is called upon to decide questions involving the validity of state action, whether it deems such action wise or unwise. The value of our system of federalism, and of local self-government in local matters which it embodies, should be kept firmly in mind, as we believe it was by those who framed our Constitution.

At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: "If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment." (Quoted in 31 *Boston University Law Review* 43.)

We believe that what Mr. Root said is sound doctrine to be followed towards the Constitution, the Supreme Court and its interpretation of the Constitution. Surely, it is no less incumbent upon the Supreme Court, on its part, to be equally restrained and to be as sure as is humanly possible that it is ad-

hering to the fundamentals of the Constitution with regard to the distribution of powers and the separation of powers, and with regard to the limitations of judicial power which are implicit in such separation and distribution, and that it is not merely giving effect to what it may deem desirable.

We may expect the question as to what can be accomplished by the report of this committee or by resolutions adopted in conformity with it. Most certainly some will say that nothing expressed here would deter a member or group of members of an independent judiciary from pursuing a planned course. Let us grant that this may be true. The value of a firm statement by us lies in the fact that we speak as members of all the state appellate courts with a background of many years' experience in the determination of thousands of cases of all kinds. Surely there are those who will respect a declaration of what we believe. And it just could be true that our statement might serve as an encouragement to those members of an independent judiciary who now or in the future may in their conscience adhere to views more consistent with our own.

Respectfully submitted:

Frederick W. Brune, Chief Judge of Maryland, *Chairman*
Albert Conway, Chief Judge of New York
John R. Dethmers, Chief Justice of Michigan
William H. Duckworth, Chief Justice of Georgia
John E. Hickman, Chief Justice of Texas
John E. Martin, Chief Justice of Wisconsin
Martin A. Nelson, Associate Justice of Minnesota
William C. Perry, Chief Justice of Oregon
Taylor H. Stukes, Chief Justice of South Carolina
Raymond S. Wilkins, Chief Justice of Massachusetts

FOR YOUR
REFERENCE
LIBRARY

1st

IN A SERIES OF HISTORIC STATEMENTS EXPOUNDING THE ROLE OF THE STATES IN THEIR RELATION TO THE CENTRAL GOVERNMENT. *Requests for Additional Copies of This Report, or for Other Material in This Field, Should be Addressed to*

THE VIRGINIA COMMISSION ON CONSTITUTIONAL GOVERNMENT
TRAVELERS BUILDING RICHMOND, VIRGINIA.